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No. 85-541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BARCLAYSAMERICAN/CREDIT, INC.,
Petitioner

v.

ARTHUR QUILLER, LILLIE MAE QUILLER, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER BANKERS ASSOCIATION, AND THE NATIONAL COUNCIL OF SAVINGS INSTITUTIONS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONER'S POSITION

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MOTION OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER BANKERS ASSOCIATION, AND THE NATIONAL COUNCIL OF SAVINGS INSTITUTIONS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Financial Services Association (AFSA), the Consumer Bankers Association (CBA), and the National Council of Savings Institutions (the Council) re-

spectfully move, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amici curiae* in support of Petitioner's position. The Petitioner has consented to the filing of such brief. The Respondents denied consent to file *amicus curiae* briefs to both AFSA and CBA before the Eleventh Circuit. AFSA and CBA were granted permission to file before the Eleventh Circuit.

The AFSA is the nation's trade association serving consumer finance companies. Organized in 1916, AFSA represents over 550 companies engaged in the extension of consumer credit throughout the United States.

AFSA member companies are vitally interested in this case as they hold over $9.4 billion in manufactured housing loans as of July 1985,[1] much of which is financed under the regulatory framework, the validity of which is at issue in this case.

CBA is a nonprofit organization that was organized in 1919 to provide a voice for the retail banking industry. Today, membership in CBA is open to any federally insured depository institution, including commercial banks, thrifts and credit unions. Combined, CBA members now hold over 70% of all consumer credit outstanding held by commercial banks and over 80% of the consumer credit accounts held by commercial banks.

Federally insured depository institutions are vitally interested in the outcome of this case as they hold more than $15 billion in manufactured housing loans as of April 1985.[2]

The Council, formed by a consolidation of the National Savings and Loan League and the National Association

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[1] *G.19 Statistical Report,* Federal Reserve Board, September 17, 1985.

[2] *August 1985 Federal Reserve Bulletin,* p. A40.

of Mutual Savings Banks, represents over 600 savings institutions with aggregate assets of over $400 billion. Council members finance manufactured housing and operate under a general regulatory framework administered by the Federal Home Loan Bank Board, the agency whose regulation and ultimate authority are at issue in this case.

Until this litigation, the preemption provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 161 (1980) codified at 12 U.S.C. § 1735f-7 (the Preemption Act) and the implementing regulations were understood by the industry and interpreted by the legal community and the Federal Home Loan Bank Board (the Bank Board) to entail a few, straight-forward contractual disclosure requirements. The court of appeals' decision is premised on a hypertechnical interpretation of the substance of the Preemption Act. Worse yet, this interpretation is itself based on an erroneous view of the congressional purpose underlying the Preemption Act. Based on this decision, thousands of transactions are at risk through their failure to withstand such scrutiny. Litigation reminiscent of that experienced under the original Truth-in-Lending Act may be anticipated, particularly in view of the extraordinary recoveries sought herein.

This decision has created substantial uncertainty in the marketplace as to the requirements of the Preemption Act, thereby discouraging prospective investment nationwide in contracts entered into pursuant to that law. The court of appeals decision jeopardizes the heretofore justified reliance of creditors on the interpretations of the Bank Board, which, in an era of form contracts made by interstate credit grantors, is essential. This decision thereby directly thwarts the congressional intent to facilitate national housing policies underlying the Preemption Act.

WHEREFORE, it is respectfully requested that the Court grant movants leave to file the attached brief as *amici curiae* in this case.

Respectfully submitted,

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October 25, 1985

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BRIEF AMICI CURIAE OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION, THE CONSUMER BANKERS ASSOCIATION, AND THE NATIONAL COUNCIL OF SAVINGS INSTITUTIONS IN SUPPORT OF THE PETITIONER'S POSITION

STATEMENT OF INTERESTS

The AFSA is the nation's trade association serving consumer finance companies. Organized in 1916, AFSA represents over 550 companies engaged in the extension of consumer credit throughout the United States.

AFSA member companies are vitally interested in this case as they hold over $9.4 billion in manufactured housing loans as of July 1985, much of which is financed under the regulatory framework, the validity of which is at issue in this case.

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sured depository institution, including commercial banks, thrifts and credit unions. Combined, CBA members now hold over 70% of all consumer credit outstanding held by commercial banks and over 80% of the consumer deposit accounts held by commercial banks.

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The Council, formed by a consolidation of the National Savings and Loan League and the National Association of Mutual Savings Banks, represents over 600 savings institutions with aggregate assets of over $400 billion. Council members finance manufactured housing and operate under a general regulatory framework administered by the Federal Home Loan Bank Board, the agency whose regulation and ultimate authority are at issue in this case.

Until this litigation, the preemption provisions of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 161 (1980) codified at 12 U.S.C. § 1735f-7 (the Preemption Act) and the implementing regulations were understood by the industry and interpreted by the legal community and the Federal Home Loan Bank Board (the Bank Board) to entail a few, straight-forward contractual disclosure requirements. The court of appeals' decision is premised on a hypertechnical interpretation of the substance of the Preemption Act. Worse yet, this interpretation is itself based on an erroneous view of the congressional purpose underlying the Preemption Act. Based on this decision, thousands of transactions are at risk through their failure to withstand such scrutiny. Litigation reminiscent of that experienced under the original Truth-in-Lending Act may be anticipated, particularly in view of the extraordinary recoveries sought herein.

This decision has created substantial uncertainty in the marketplace as to the requirements of the Preemption Act, thereby discouraging prospective investment nationwide in contracts entered into pursuant to that law. The court of appeals decision jeopardizes the heretofore justified reliance of creditors on the interpretations of the Bank Board, which, in an era of form contracts made by interstate credit grantors, is essential. This decision thereby directly thwarts the congressional intent to facilitate national housing policies underlying the Preemption Act.

SUMMARY OF ARGUMENT

Congress enacted the Preemption Act to assure the availability of mortgage credit for both site-built and manufactured housing in states whose usury limits were fixed in preinflationary times. Without such preemption, available mortgage funds would have continued to migrate to states with less stringent usury limits. This situation brought great hardship to the housing industry and to the consumer in search of affordable housing. Therefore, the court of appeals determination that consumer protection is a principal object of the Preemption Act and the "price" of interest rate relief, is an untenable construction of the congressional purpose and action.

Appellees have in no way been harmed. Substantial damage will entail, however, for the nation's housing policies, manufactured housing lenders and consumers seeking affordable housing as a result of the court of appeals decision.

In light of the above, amici curiae respectfully submit that the court of appeals decision directly contradicts the congressional intent behind the Preemption Act, thwarts national housing policies, jeopardizes heretofore justifiable reliance on interpretations of the Bank Board and causes unjustifiable harm to manufactured housing lenders and to consumers in search of affordable housing.

ARGUMENT

I. THE PURPOSE OF THE PREEMPTION ACT WAS TO OVERRIDE STATE INTEREST RATE LIMITATIONS ON RESIDENTIAL MORTGAGE TRANSACTIONS, NOT TO REQUIRE NEW CONSUMER PROTECTIONS

The court of appeals decided that an ambiguous reference to consumer protections—not required to be disclosed in a mortgage contract—misled the borrower and deprived the contract of federal rate relief. Essential to this determination, was the court's view that the Preemption Act is a consumer protection law designed to be strictly and technically construed. However, an analysis of the history and content of the federal law in question does not support this view. Instead, the Preemption Act was designed to afford interest rate relief to financial institutions and mortgage lenders to ease a credit crunch.

A. The Legislative History Reflects That Congress Simply Intended To Stimulate Housing Finance, Not To Create A New Consumer Protection Statute

The Preemption Act contains three parts, each dealing with a different segment of a lending market that, at the time of the law's passage, could only be described charitably as "troubled." At the time of passage, prevailing market interest rates for consumer and commercial loans approached or exceeded 20% per annum. The cost of funds in this period, as reflected by the prime lending rate and the federal discount rate, followed close behind.

Part A of the Act—described below—is the subject of this case. Part B created an alternative federal interest rate for business and agricultural loans and Part C freed federally-insured institutions from restrictive state usury laws.

Part A of the Act totally preempts state law limitations on residential mortgage loans secured by a first

lien.[1] Congress determined that the housing industry was particularly susceptible to the destabilizing effects of a market with rates at a historical high and with state law rate limitations established during the depression.[2]

As the legislative history explains:

> (W)here state usury laws require mortgage rates below market levels of interest, mortgage funds in those states will not be readily available and those funds will flow to other states where market yields are available. *This artificial disruption of funds availability not only is harmful to potential homebuyers in states with such usury laws, it also frustrates national housing policies and programs.*
>
> (T)his limited modification in state usury laws will enhance the stability and viability of our Nation's financial system and *is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending.* S. Rep. No. 96-368, 96th Cong., 2nd Sess. 18-19 (1979), *reprinted in* 1980 U.S. Code Cong. and Ad. News 254-55. (emphasis added)

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[1] Sec. 501, Pub. L. No. 96-221.

[2] Senator Proxmire's opening statement accompanying the Senate bill which included the eventual Preemption Act noted:

> "Usury limits have become economically counter-productive, if they ever had any purpose.
>
> Most usury limits were established during the depression and bear no reasonable relationship to today's circumstances. Borrowers are hurt, not helped, by unrealistic lending limits and also homebuilding, small business, or agricultural purposes, if they are restricted to rates below the market rate. The homebuilding industry is particularly disadvantaged by usury limits . . . the impact will be most severely felt by younger, lower-income prospective homeowners."

Usury Lending Limits: Hearing on S. 1988 before the Comm. on Banking, Housing and Urban Affairs, 96th Cong., 1st Sess. (1979).

The legislative history noted that preemption of state law limitations ultimately would have the salutory effect of permitting loan originators to offer more attractive rates of return, thereby attracting increased capital to fuel a housing recovery.

> In addition to the adverse effects of usury ceilings on credit availability, mortgage rate ceilings must be removed if savings and loan institutions are to begin to pay market rates of interest on savings deposits. *Without enhancing the ability of institutions to achieve market rates on both sides of their balance sheets, the stability and continued viability of our nation's financial system would not be assured. Thus, Federal preemption of State usury ceilings would not only promote national home financing objectives but would provide the resources with which savers could be paid more interest on their savings accounts.* (emphasis added) *Id.*

Significantly, the legislative history reflects a specific intention not to address the question of consumer protection on the federal level.

> In exempting mortgage loans from state usury limitations, the Committee intends to exempt only those limitations that are included in the annual percentage rate. The Committee does not intend to exempt limitations on prepayment charges, attorney fees, late charges or similar limitations designed to protect borrowers. *Id.*

Both the statute and the legislative history of the Preemption Act clearly show that Congress was preoccupied with the need to stimulate housing credit by freeing it from the shackles of an archaic system of state rate ceilings. The court of appeals mistakenly read a consumer protection scheme into the congressional purpose and action behind passage of the Act.

Had Congress intended to make consumer protections the centerpiece of the Preemption Act it could have done

so. In fact, the Preemption Act is but one title of comprehensive legislation. The Truth-in-Lending Simplification and Reform Act (The "Simplification Act") was enacted along with the Preemption Act as Title VI of Pub. L. No. 96-221. It was specifically designed to simplify and clarify the technical disclosure requirements of the original Truth-in-Lending Act and thereby limit the volume of frivolous litigation that had erupted under the original law.[3] The passage of the Simplification Act as a separate but companion piece to the Preemption Act clearly distinguishes the congressional intent behind the respective laws and evinces a congressional goal to discourage the very type of hypertechnical litigation that is before this Court on appeal.

Unlike the Preemption Act, the Simplification Act is categorical in its avowed consumer protection purposes and detailed requirements:

> It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.[4]

The Simplification Act comprises a total of 31 statutory sections specifying in detail the disclosures that must be made at every step of a consumer credit transaction. This statutory scheme is, of course, fleshed out by Regulation Z which is comprised of 4 subparts, 29 separate sections, and a 10-part appendix.[5] In addition, the staff of the Federal Reserve Board has published its

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[3] See the *Background and Summary of Regulation Z* published by the Board of Governors of the Federal Reserve System, Paragraph 6-1125.1 of the Federal Reserve Regulatory Service, Vol. 2.

[4] Sec. 102. Pub. L. No. 90-321 (as amended).

[5] 12 CFR §§ 226.1 *et seq.*

Official Staff Commentary to Regulation Z, a 100-plus page supplement, which is updated annually.

In striking contrast to the volume and detail of this federal consumer protection law and regulation, section 501(c) of the Preemption Act—in its entirety—provides that the terms and conditions relating to a manufactured housing loan or credit sale shall comply with Bank Board regulations which are to:

> (1) Include consumer protection provisions with respect to balloon payments, prepayment penalties, late charges, and deferral fees;
>
> (2) require a 30-day notice prior to instituting any action leading to repossession or foreclosure (except in the case of abandonment or other extreme circumstances);
>
> (3) require that upon prepayment in full, the debtor shall be entitled to a refund of the unearned portion of the precomputed finance charge in an amount not less than the amount which would be calculated by the actuarial method, except that the debtor shall not be entitled to a refund which is less than $1; and
>
> (4) include such other provisions as the Federal Home Loan Bank Board may prescribe after a finding that additional protections are required. Sec. 501(c)(1) through-(4), Pub. L. No. 96-221.

Clearly, the statute requires neither express disclosure requirements nor specific contractual consumer protection provisions.

This Court has plainly stated there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Association*, 310 U.S. 534, 543 (1940). Where the words of a statute are unambiguous, this Court repeatedly has required that the "plain meaning" of the statutory lan-

guage be followed. See *Potomac Electric Power Co.* v. *Director*, 449 U.S. 268, 283-84 (1980); *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 176 (1980); *Diamond* v. *Chakrabarty*, 447 U.S. 303, 315-18 (1980); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *McDonald* v. *Thompson*, 305 U.S. 263, 266 (1938).

The court of appeals has gone beyond the plain meaning of the statutory language to find a requirement that additional consumer protections are required. With the exception of the prepayment and notice requirements stated above, the substance of the consumer protections that are to be included in the Bank Board regulation are not described. In fact, subsections 501(c)(1) and 501(c)(4) generally defer to the judgment of the Bank Board and evidence little legislative regard for the particular form of the consumer safeguards. This lack of specificity with regard to form sharply contrasts with the Simplification Act and undercuts the notion that specificity was a statutory object or compliance requirement.

Congress' lack of specificity further reflects the fact that the Preemption Act was designed to encourage affordable housing nationwide and not to reform particular industry practices. No findings or statements in the legislative record address any particular industry abuses. Section 501(c) is not phrased as a comprehensive reform measure. Rather, the benefits in question more likely evidence a congressional intent to provide parity for persons engaged in all types of residential mortgage finance transactions.

Where Congress was specific was in its limitations as to the nature of the federal preemption embodied in the Preemption Act. First, it stated that "(the) provisions of the constitution or the laws of any state expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged,

taken, received or reserved shall not apply to any loan, mortgage, credit sale or advance" which falls within a prescribed statutory definition.[6] Second, it premised preemption on the express condition that the states could opt out of the preemptive framework, thereby striking a balance between state and federal government.[7]

Again, the federal intention is clear. A federal preemption impacting state law only with respect to the rate of return on certain loans or credit sales, and which can be overridden at the state's discretion, evidences no particular consumer protection concern.

In sum, Congress neither intended nor enacted a federal scheme of consumer protections or intended to remedy particular industry practices when it passed the Preemption Act.

B. The Court Of Appeals Determination That Consumer Protection Was The "Price" Of Rate Relief Was In Error

Neither the legislative history nor the content of the Preemption Act evidences a dominant consumer protection purpose. No comprehensive scheme of consumer rights is expressed. No technical precision in consumer disclosure is required. No pattern of industry practice or abuse is described. The states were provided the option of overriding the Preemption Act at their sole discretion.

Yet, the court of appeals decision hinges on a construction that the Preemption Act bartered rate relief in exchange for the provision of consumer protections.

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[6] Sec. 501(a)(1). Pub. L. No. 96-221.

[7] Only 14 states and the territory of Puerto Rico opted out of the usury preemption provisions as of April 1, 1983, the sunset date for doing so. See 5 Fed. Banking L. Rep. (CCH) Paragraph 58,910 and citations contained therein. Georgia opted out of the statute effective March 31, 1983 via H.B. 128.

In fact, the true "price" of rate relief under the Act is the satisfaction of the statutory definitions of a "creditor" who makes "federally related mortgage loans."

The general preemption language of the Act is clear. Section 501(a)(1) provides in essence that preemption will apply to transactions occurring after March 31, 1980, which are secured by a first lien on residential property if the transaction constitutes a "federally related mortgage loan" made by a "creditor" as those terms are defined in section 527(b) of the National Housing Act, as amended by Pub. L. No. 96-399 (October, 1980).[8]

The court of appeals appears to have lost sight of the statutory framework by concluding, in effect, that the "price" of preemption is the provision of consumer protections. Clearly, the "price" is considerably more than that, as a transaction is not either "in" or "out" of the Preemption Act solely on the basis of consumer protection issues.

The "consumer protection" clauses in the Preemption Act surfaced in an eleventh-hour conference committee compromise. This very brief consideration, when viewed in the context of the Preemption Act generally, and when compared to actual federal consumer credit protection law, more clearly reflects a congressional intent to provide buyers of manufactured housing, typically low-to-moderate income families, legal parity with persons entering into conventional residential mortgage arrangements. In short, the manufactured housing provisions were added to the Preemption Act in an effort to stimulate the provision of adequate and affordable housing at all income levels. Further, in recognition that this object could be frustrated if such financing was conducted in

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[8] Sec. 501(a)(1)(A), (B) and (C); Section 527(b) of the NHA is found at 12 U.S.C. Section 1735f-5(b); Cf. Burke, Federal Preemption of State Usury Laws, The Business Lawyer, Vol. 37, p. 750 (1981 ABA Annual Meeting Program).

accordance with something other than standard residential mortgage practices, the so-called "consumer protection" provisions were included.

The House Conference Report underscores the congressional intent to standardize residential mortgage lending practices:

> Manufactured home financing is covered by the mortgage usury preemption as long as such financing complies with consumer protection provisions specified in regulations of the FHLBB. The conferees intend that in developing these regulations the Bank Board should look for guidance to *regulations*, handbooks and circulars *of the FHA and VA* regarding mobile home lending, the provisions of the *standard conventional mortgage forms* of *FHLMC* and *FNMA*, and the provisions of the Uniform Consumer Credit Code. P. 79, Conf. Comm. Rpt. on H.R. 4986, Report No. 96-842, filed March 21, 1980. (emphasis added)

Congress sought to standardize mortgage lending practices in the manufactured housing market by providing for requirements typical to all residential mortgage arrangements, realizing that such financing at that time was generally subject to a scheme of motor vehicle sales finance and Uniform Commercial Code provisions in the various states which contain strict remedial provisions more appropriate to the financing of personal property. Instead, Congress sought to insure that manufactured housing would be treated like any other residential mortgage lending.

The above cited portion of the Conference Committee Report on the Preemption Act refers to the terms contained in the FHA and VA mobile home regulations, standard secondary mortgage market documentation and the U.C.C.C. The FHA and VA regulations to which the Bank Board was referred indicate no particular scheme of consumer protections or disclosures. Typical require-

ments include those covering manufacturers' warranties, site preparation, FHA and VA points and title and lien requirements.[9] Loan limitations, credit eligibility requirements, and maturity provisions are other examples of the concerns addressed in these regulations. They clearly do not constitute a program of particular consumer benefits except to the extent that they inject a modicum of commercial reason and uniformity necessary to the efficient operation of these federal insurance programs.[10]

The emphasis is clear—standard industry practices, as embodied in federally-assisted home financing regulations, conventional financing documentation, and uniform law systems, are to be followed. No particular abuses are highlighted. No particular disclosures are mandated. The Bank Board was provided with little specific guidance and a broad degree of discretion.

To view consumer protection as a principal object of either the manufactured home provisions specifically or the Preemption Act generally, is to misconstrue Congress' real objective. The language of section 501(c) of the Preemption Act, viewed in the context of the legislative history and the other provisions of the statute, merely denotes the congressional desire to promote affordable housing for all by encouraging a standardization of all types of residential mortgage financing.

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[9] See e.g., 38 CFR Section 36.4231, and - Section 36.4235, respectively.

[10] In certain instances, these regulations countenance terms that would seem to be the antithesis of consumer protection. For example, 24 CFR Section 201.565 sanctions a fairly strict acceleration provision as follows:

> Section 201.565 Default Provision.
>
> The obligation shall contain a provision for acceleration of maturity, at the option of the holder, upon default in the payment of any installment upon the due date thereof, or failure to make the payments of rent, taxes, or other charges incurred in connection with the lot or site where the mobile home is emplaced.

In sum, rate relief, even within the context of manufactured housing transactions, was not premised on consumer protection provisions. Accordingly, the court of appeals decision directly conflicts with the congressional act and intent.

II. THE FEDERAL HOME LOAN BANK BOARD HAS STATED IN REGULATIONS, AN OPINION LETTER AND IN BRIEFS SUPPORTING THE PETITIONER HEREIN THAT NO CONTRACTUAL NOTICE OF DEFAULT IS REQUIRED

In discharging its responsibilities under the Act, the Bank Board promulgated a regulation consonant with congressional intent. Like the Act, the regulation did not require that contracts provide notice of a borrower's right to a 30-day notice of default. (12 C.F.R. § 590.4(h)(1))

Having promulgated the regulation, the Bank Board has interpreted it consistently. Its General Counsel, in an opinion letter dated October 28, 1982, stated:

> This requirement refers only to the act of giving notice; neither paragraph (h) nor the Congressional legislation that it implements (Depository Institutions Deregulation and Monetary Control Act of 1980. Pub. L. No. 96-221, § 501, 94 Stat. 161-63 (1980)) expressly requires that a covered credit agreement recite the purchaser-borrower's right to notice. Furthermore, there are no legislative or regulatory history materials suggesting that either Congress or the Board intended an implicit requirement of a contractual notice provision. If a contractual notice provision requirement had been intended, it is reasonable to assume that the Board would have expressly so provided, as it did in paragraphs, (d) (Prepayment with Penalty), (e) (terms of balloon payments), (f) (late charges), and (g) (agreements for deferral of fees) of section 590.4. *In light of these considerations, it is the view of this*

Office that section 590.4(h) does not require that the terms of a manufactured home credit sale agreement recite the purchaser's right to 30 days notice of acceleration or repossession. (emphasis added.) (5 Banking L. Rep. (CCH) ¶ 83-027).

As "chief legal officer" of the Bank Board, the general counsel's duties include "advising the Board with respect to interpretations involving questions of law." (12 C.F.R. 500.17 (1983)).

Proper regard for the role of the Bank Board as Congress' chosen instrument under the Act, and proper regard for the general rule of deference to an agency's construction of its own regulations, as described by this Court in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), require that controlling weight be given to the Bank Board's views. Where Congress has delegated broad rulemaking power to an agency, deference is especially apt. See e.g., *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945).

This Court has long held that agency interpretations should be followed by a reviewing court. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450-51 (1978); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371 (1973); and *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

Further, this Court has recognized that special deference is appropriate with respect to agency interpretations where reliance interests are likely to have intervened. See *Train* v. *Natural Resources Defense Council*, 421 U.S. 60, 87 (1975); *Udall* v. *Tallman (Id.)*. Substantial policy considerations support such special deference, particularly in the area of credit transactions. Creditors must rely upon agency interpretations to comply with various statutes and regulations. Form contracts are drafted in reliance on such interpretations. In this case, literally thousands of manufactured housing credit transactions have been entered into in reliance upon the Bank Board's regulation and interpretation.

More than once this Court has addressed the issue of reliance on opinions of administrative agencies dealing directly with such credit-related issues. In *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), this Court found that a Federal Reserve Board staff interpretation was entitled to the same respect as an official interpretation, absent the finding that the interpretation was demonstrably irrational.

Far from finding the Bank Board's interpretation demonstrably irrational, the panel below (hereinafter referred to as *Quiller I*) cited *Milhollin* and admitted that "to qualify for federal preemption under the Act the financing agreement need not contain an express term guaranteeing the debtor 30-day notice before repossession or foreclosure." *Quiller, et al.* v. *BarclaysAmerican/Credit, Inc.* 727 F.2d 1067, 1071 (11th Cir. 1984)

Had the court of appeals stopped at that point, *amici* would not now be before this Court.

Instead, the court of appeals held that contractual provisions concerning immediate declarations of default and acceleration are contrary to the rights provided to consumers under the Act. The Bank Board has made a contrary finding. In its brief *amicus curiae* filed before the rehearing *en banc* (hereinafter referred to as *Quiller II*), the Bank Board has stated:

> "Contract language providing for immediate declarations of default and accelleration is not necessarily contrary to the Act and the implementing regulation. Both the Act and the regulation specifically provide for circumstances in which a creditor may in fact act without notice. Overlooked by the Borrowers are the qualifications in the full text of the Act and the regulation. The Act merely requires that the Board issue a regulation that requires a '30-day notice prior to instituting any action leading to repossession or foreclosure (*except in the case of abandonment or other extreme circumstances*)'" 12

U.S.C. § 1735f-7 note (c)(2) (emphasis added in original) (Reprinted in Appendix to Petition for Writ of Certiorari at Page L-13)

The Bank Board brief rightly points out that the Barclays' contract does not claim an unqualified right to foreclosure without notice and was expressly qualified by the borrower's rights to notice and cure. As the Bank Board brief summed up the language, "the contracts do not controvert the protections of the Act." (At Petitioner's Appendix at Page L-14)

The *Quiller II* case is reported at 764 F.2d 1040 (11th Cir. 1985) (*en banc*).

The panel in *Quiller I* then looked to congressional intent to justify its conclusion that the "terms and conditions" relating to the loan agreement did not comply with § 590.4(h). The court found that Congress conditioned federal preemption on the creditor's compliance with consumer protections. Significantly, neither the panel in *Quiller I* nor the court of appeals in *Quiller II* found the Bank Board's interpretation to be demonstrably irrational.

Since *Milhollin* was decided, this Court has restated the view that regulations promulgated by a governmental body responsible for interpreting or administering a statute are entitled to considerable respect, *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155 (1981). Again, in *Anderson Brothers Ford, et al.* v. *Valencia*, 452 U.S. 205 (1981), this Court found that, absent some obvious repugnance to the statute, an agency's interpretation of its own regulation should be accepted by the court.

The court of appeals did not find that the Bank Board's interpretation was obviously repugnant to the statute. Nor could it, as the interpretation and regulation followed the statute.

The Bank Board filed *amicus curiae* below stoutly defending its regulation and statutory interpretation.

This decision creates a double standard for regulatory agencies regulating financial institutions. Left undisturbed, the practical effect of the court of appeals decision is to create a safe harbor for creditors who follow the regulatory regime of the Board of Governors of the Federal Reserve System while leaving those who follow the precepts of the Bank Board "tossed by the waves of chance."

CONCLUSION

The manufactured housing finance community and its congressionally-designated regulatory agency face a dilemma. The court of appeals decision directly contradicts congressional intent, thwarts national housing policies, and jeopardizes the hithertofore justified reliance by credit grantors on the interpretations of regulatory agencies. In an era of form contracts made by interstate credit grantors, such reliance is not merely desirable, it is essential.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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